

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

75-1348

To Be Argued By
WALLACE MUSOFF

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PJS.

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1348

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH BUGLIARELLI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

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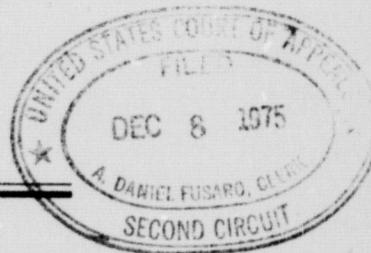




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Constitutional Provisions Involved

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Status Involved

Title 26 United States Code, Sec. 7201. Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

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BRIEF FOR APPELLANT

QUESTIONS PRESENTED

1. Whether the failure of the trial judge to exclude the alleged admissions of defendant of no cash on hand, when interviewed by Special Agents without procedural warnings, is reversible error?

2. Whether the admission of a wire-recording made on February 11, 1972 and testimony relevant thereto, all indicating a prior arrest record of the defendant, and his association with gambling activity as well as his corrupting a police officer in a non-related year, constitute reversible error?

PRELIMINARY STATEMENT

On September 25, 1975, the defendant, Joseph Bugliarelli, was tried and convicted by a jury on two counts of income tax evasion for the years 1970 and 1971. He was sentenced to two years imprisonment on each count, such sentence to run concurrently.

The government's case against the defendant was premised upon a wholly circumstantial methodology of proof - the expenditures method of determining income.

The defendant did not dispute the expenditures made during the years in issue, but claimed that the source of funds for such expenditures did not result from taxable income, but emanated from his deceased brother, Frank Bugliarelli.

The Government, in support of its expenditures theory of proof, in order to establish a starting point, utilized, over defendant's objections, the defendant's admissions to special agents that he had never had any cash on hand.

In further support of its circumstantial methodology of proof, purportedly to show a "likely source" for the funds expended by defendant in 1970 and 1971, the Government, over defendant's objections, relied upon a wire-recording made on February 11, 1972, and testimony by New York City Police Officers, who had made the recording during a raid on premises used as the situs of a gambling (policy) operation. The subject of the police raid was not the defendant, but one Vincent Tarallo who was already under arrest that fateful day when defendant appeared on the premises. The defendant was searched upon entering the premises although no incriminating (gambling) evidence was found on his possession and was engaged in conversation by Sergeant Blatus (the officer wearing the recording device).

The recorded conversations encompassed everything said by Vincent Tarallo before defendant's appearance as well as defendant's own statements to the effect that he was a "main cousin", that he had a record and that the gambling premises were maintained under police protection. The recording also indicated the payment of

two hundred dollars to Sergeant Blatus to enlist his protection of the premises.

Nowhere in the recording or the testimony of the police officers involved was there evidence that the defendant had engaged in any gambling activities prior to 1972. The closest we come to such evidence is merely the following colloquy between Sergeant Blatus and the defendant regarding the prospective payment of money by the defendant to Blatus (A 181, A 182):*

Sgt. Blatus - What do you think it's worth?
I mean you tell me. What did it cost you before?

Defendant - A hundred and a quarter a month.

STATEMENT OF FACTS

The Government's case which led to defendant's conviction was based upon three factors: First, the defendant had expenditures in excess of reported income during the years 1970 and 1971. Second, the defendant possessed no cash on hand to account as a source for the expenditures.¹ Third, the defendant possessed a

* Reference is to defendant's Appendix. Citations to the suppression hearing will contain the pagination preceded by the letter "S". When the pagination is not preceded by "A" or "S" then the reference is to the record itself.

1 The defendant advanced the defense at trial through the testimony of his sister-in-law, Ann Bugliarelli, (581-658) that the funds for making the expenditures were given to the defendant by his brother, Frank Bugliarelli, prior to the latter's death. Evidence was introduced to show that Frank Bugliarelli was arrested on December 6, 1968 for bookmaking and possession of gambling records to account for his accumulation of funds. (A 108) The jury, by convicting the defendant chose to deem the testimony of Ann Bugliarelli as not being credible. Defendant makes no argument, *per se*, of the sufficiency of the evidence to convict the defendant as it relates to the rejection by the jury of the testimony of Ann Bugliarelli.

likely source of taxable income during the years 1970 and 1971 from gambling activities whereby the jury could infer that the defendant had wilfully underreported his income for each such year.

The defendant does not dispute that the expenditures forming the basis for the government's methodology of proof were made. An extensive stipulation of facts was entered into (291-300) and supplemented during the trial (360-369). It is only with respect to the second and third factors that defendant takes issue.

The defendant's position on appeal is that reversible error occurred in connection with the admission of alleged statements of the defendant to special agents, that he never had any cash on hand after being interviewed without first having received advice of his constitutional rights as procedurally mandated.

Defendant also contends reversible error occurred in the admission of a wire-recording made on February 11, 1972 to establish gambling activity as a likely source of taxable income in 1970 and 1971, together with all of the attendant testimony and circumstances surrounding the admission of the recording and statements at trial flowing therefrom.

Alleged Admissions as to No Cash on Hand

On December 6, 1972, defendant was first interviewed by Special Agents Morton Dick and George Mooradian of the Internal Revenue Service. (344-347) At the outset of the interview the memorandum reflects that the defendant was "read....his rights

as stated in N.A.R. Pub. No. 120 (11-70) and asked if he understood his rights." The memorandum of interview further reflects that, "He did not want to answer when questioned about inheritance [sic]"; and "He refused to answer when asked about cash kept at home." (346)

Subsequent to the December 6, 1972 interview of the defendant, Special Agent Morton Dick, who was in charge of the investigation of the defendant (328), conducted six further interviews.² At no interview of the defendant after December 6, 1972 did either Special Agent Dick or the Special Agent who accompanied him advise the defendant of his rights pursuant to N.A.R. Pub. No. 120 (11-70). This is true notwithstanding the instructions set forth in IRS Release No. 897, October 3, 1967³ and IRS News Release No. 949, November 26, 1968.⁴

Although when defendant was first interviewed on December 6, 1972 and he invoked his privilege not to respond to questions relating to cash on hand after being advised that he could do so, he was again interviewed with respect to this very issue

2 The interviews of the defendant took place on December 6, 1972, December 11, 1972, January 17, 1973, February 14, 1973, March 15, 1973 and June 18, 1973. Only the interviews of December 6, 1972 (344-347), January 17, 1973 (208-228), March 15, 1973 (247) and June 18, 1973 (228-229) were brought out at trial through testimony.

3 7 CCH 1967 Stand. Fed. Tax. Rep., Par. 6832.

4 7 CCH 1968 Stand. Fed. Tax. Rep., Par. 6946.

some six months later, on June 18, 1973, without being advised this time of his right to remain silent and seek counsel, and he is alleged to have admitted having no cash on hand (228-229, 232).

Wire Recording of February 11, 1972

A. Pre-trial Motion to Suppress the Wire Recording

On February 11, 1972, the defendant was arrested by Officers of the New York City Police Department, Public Morals Division for offering a bribe to a police officer, to-wit: the sum of two hundred dollars,⁵ to drop gambling charges against Vincent Tarallo.

At the time the incident arose, one of the arresting officers, Sergeant Blatus, had on his person a concealed wire-recording device which captured the conversation between Sergeant Blatus and whoever was in close proximity to him. Specifically, the discussions between Blatus and the appellant-defendant and Tarallo and Blatus were recorded. Patrolman William John who was present during the arrest of Tarallo and the appellant transcribed the wire recording (S.42-46).

Although the wire recording took place some six weeks after the last day of the last taxable year for which defendant was indicted, 1971; although there was no evidence produced by the wire recording that defendant had an interest in the gambling establishment prior to 1972; although there is no evidence

5 The defendant ultimately pled guilty to giving an unlawful gratuity.

produced by the wire recording that the defendant had any gambling paraphernalia upon him at the time of his arrest; and although the recording explicitly indicated that defendant had an arrest record, the wire recording and its transcription were allowed to go before the jury.⁶ (A 175 - A 188)

6. The objections of counsel were first made at a suppression hearing held on September 17 & 18, 1975. Those objections pertinent hereto were set forth as follows:

MR. MUSOFF - Your Honor, my objections to the -- to this type of evidence is based on four points. First, again, I must repeat that the conversations alluded to on the wire pertain only to the year 1972. The wire recording was made on February 11, 1972.

THE COURT - And I asked you yesterday what are the tax years in question. I believe you answered 1971 and 1970.

MR. MUSOFF - 1970 and 1971. I feel that even if there is a relevancy, that the prejudicial effect far outweighs any probative value, especially so --

THE COURT - What is the prejudicial effect?

MR. MUSOFF - The prejudicial effect is that the wire alludes to conversations about gambling activities, payoffs of police officers. The maintenance of what is commonly known as a pad. And I feel that in accordance with the decisions in this circuit that it would make impossible the dispassionate approach necessary for justice to be achieved by diverting the jury from the real issue in this case and that is whether or not Mr. Bugliarelli did, in fact, fail to report all of his income in the years 1970 and 1971. I say the prejudice became even more manifest when the Government is relying wholly on a circumstantial methodology of proof and the man's business activities in those years involved the operation of a luncheonette, which is a cash business and leaves the Government open to argue that a likely source for the excess expenditures which they are seeking to establish emanated from the luncheonette and I am willing to stipulate that the Government can infer a likely source without, of course, admitting that there was such a source.

THE COURT - A likely source from what circumstance from what fact?

MR. MUSOFF - From the luncheonette. From the operation of the luncheonette. In other words, they have a

B. Evidence at trial

Sergeant Blatus testified that on February 11, 1972, he entered, with other police officers, an abandoned apartment located at 255 East 155th Street, Bronx, New York where Tarallo was found in the possession of gambling records

6 (cont'd)

business, your Honor, which has been used in many cases in the past for the Government to infer a likely source of unreported income. Having something that they could readily point to and then let them gild the lily by possibly inflaming the jury with this alleged gambling activity and the evidence there only indicates it was confined to 1972, I'm sure all of the police officers will state, according at least to my perusal of the State record, that the earliest time that they knew that any gambling activities were being conducted on the premises involved was February 7 of 1972, so to permit this type of inflammatory material in from which the Government can then argue --

THE COURT - Of course, I don't accept your statement of it being inflammatory. As I understand it the Government is offering this proof to show a likely source of income and if the Government is contending as apparently it is, that there is more than one source of income, in this instance gambling activities or whatever it was, why is the Government to be foreclosed from offering that proof?

MR. MUSOFF - Because they already have a likely source.

THE COURT - That may not be sufficient to establish their case. You may get up before the jury and proclaim that how could a man possibly have a large source of income which the Government attributes to him from this little candy store, luncheonette or whatever it is. I have not heard the Government but I assume that is their position.

MR. SCHATTEN - That is precisely my position.

THE COURT - What is your next point.

* * *

MR. MUSOFF - The lack of relevancy in that it was confined only to the year '72 when '70 and '71 are the years in issue is one point. The fact that I feel the prejudicial effect far outweighs probative value, No. 2. And I would like to site [sic] United States v. Beno at 324 F.2nd 582, which is a Second Circuit case decided in 1963, and the Second Circuit's opinion in the United States v. Krelowitch -- [sic]

THE COURT - That has no relevancy at all. Do not spend time on that. * * *

(S 5 - S 8)

(A 6 - A 8).⁷ Blatus further testified that Tarallo was arrested for illegal gambling and mutual horse race policy. (A 12)⁸

Blatus then testified as to what transpired when the defendant entered the premises. He stated that the defendant was searched and "a bunch of bills fell out of his coat onto the floor, a large sum of bills, I don't know exactly." (A 13) Blatus then was queried by the prosecutor as to what transpired thereafter.

Blatus stated that Tarallo advised him that the gambling premises was a "pad"⁹ (A 14), and that subsequent to Tarallo's statement,

7 Counsel for defendant objected to the testimony of Blatus regarding observations of Blatus at a time that the defendant was not present. (A 7, A 11) The Court sustained the objection, but allowed Blatus to testify concerning such observations. (A 7, A 8) Thereafter a cautionary instruction was given that the sole purpose of such testimony was to show a likely source of income (A 8 - A 10). In any event, all such testimony came before the jury during the playing of the wire-recording and the submission of the transcript of the recording as an aid memoire to the jury.

8 The conviction of Vincent Tarallo rendered on January 31, 1972 was unanimously reversed by the Appellate Division of the Supreme Court of New York, First Department, on the basis that the police officers had failed to announce their authority or purpose before entering the premises, since the search warrant did not expressly authorize a "no knock" entry.

9 Blatus defined a pad as follows:

BLATUS - A place would be considered a pad where they were running some kind of illegal gambling operation, usually gambling or policy, bookmaking, and they paid the police for protection to operate. They paid them a certain amount of money to operate illegally so they wouldn't have to get arrested; they could continue to operate without being bothered. (A 14)

there was a discussion between Tarallo and the defendant out of Blatus' hearing. Thereafter, Blatus testified that the defendant offered him a "pad," after the defendant advised that he was "a main cousin." (A 15, A 16).¹⁰ At the point in the dialogue between the defendant and Blatus, where the former asked if the latter wanted a "pad," Blatus asked what the defendant paid before, to which the defendant responded "\$125 a month." The defendant thereafter gave Blatus \$200 and Blatus stated that he placed both Tarallo and the defendant under arrest for bribery. (A 17)

The Government thereafter produced the bribe money and offered it into evidence. The money was received into evidence over defendant's objections, the Court stating that it was received for the "limited purpose indicated and no other purpose."
(A 19) Testimony was then elicited from Blatus regarding the events subsequent to the arrest of the defendant.¹¹

10 Blatus defined a main cousin as follows:
BLATUS - That would be -- a main cousin would be a friendly guy who does his share of paying, a substantial share of paying, that's a main cousin, that he's well known (A 15).

11 This testimony centered around statements of the defendant that he was known around the precinct where he was booked and that he had a record. (A 23) Counsel objected and the statements were stricken and the jury was told to disregard them. (A 23)

On redirect, the prosecutor questioned Blatus why he incorrectly booked the defendant for gambling when he arrested defendant for bribery. (A 64)

Blatus thereafter testified that he was "wired" during the conversation with the defendant and the wire was offered into evidence over the objections of counsel for defendant.¹²

(A 24, A 28)

Cross-Examination of Blatus

On cross-examination, Blatus testified that the first time he knew that a gambling operation existed on the premises where the arrest took place was 15 minutes before he arrived (A 48), and that there was no evidence that the defendant had committed any gambling violations at the time the defendant entered the premises or after his arrest. (A 49) Blatus also admitted that although he was a police officer attached to the Public Morals Division from November, 1970 through February 11, 1972, with jurisdiction over the entire City of New York, he had never observed Mr. Bugliarelli engaged in any gambling activities.

(A 49, A 50)

12 The wire recording was played before the jury. Each juror was given a transcript of the conversation as is found in the Appendix (A 175 - A 188). The Court instructed the jury that the recording was evidence and the transcript was merely an aid to identify the voices.
(A 29 - A 30)

The fact that the jury again heard that the defendant had a record and read it in the transcript was ultimately resolved by the Court ordering such statement excised from the transcript (A 42 - A 43) after it had already been read and heard.

Testimony of Officer William John

William John was one of the police officers who participated in the arrest and testified subsequent to Blatus.

(A 74 - A 90) John's testimony reiterated that the defendant had offered a bribe to Blatus (A 75 - A 76)¹³ and that he had been arrested for bribery. (A 76)

Cross-Examination of William John

On cross-examination, John testified that he had never observed the defendant engaged in any gambling activities at any time (A 79),¹⁴ and, further, that the gambling establishment under surveillance, when the defendant was arrested, was Tarallo's gambling operation.¹⁵

13 Although counsel objected to the introduction of such testimony, the Court overruled such objection stating that such testimony was relevant to establish a source of income. (A 76)

14 John testified on redirect that the earliest observation of the premises was about two weeks prior to the arrest on February 11, 1972. (A 86)

15 In response to the question "And that was Vincent Tarallo's gambling activities and not the gambling activities on the part of Bugliarelli, is that right?", John testified: "I believe so." (A 79, A 80)

Roger Milch

Roger Milch was the Assistant District Attorney, Bronx County, who represented the State of New York in the prosecution of the defendant arising out of defendant's arrest by Blatus on February 11, 1972. His testimony was offered for the purpose of impeaching the credibility of Sergeant Blatus.

The substance of the prosecutor's cross-examination is embodied in the following (A 99):

Q Did there come a time when you had occasion to be present at the taking of the guilty plea of Mr. Bugliarelli that day?

MR. MUSOFF: Objection, your Honor.

THE COURT: The objection is sustained and the jury is instructed "to disregard it"

I told the jury the other day when the evidence came in that we are not concerned with any alleged illegal activity of the defendant in gambling, whether it is a violation of the State or Federal Laws, nor were we concerned with whether or not bribery took place on the day in question. The evidence was limited solely and only for the purpose of permitting the government to establish a source of income, as the government alleges, from alleged gambling activities, and I sustain the objection. We are not trying that case here. We are trying an income tax evasion case, and the issues are going to be confined to that.

After which the prosecutor then proposed to offer the defendant's responses to the State Court at the time of his plea to the charges stemming from his arrest by Blatus. The following then ensued (A 101 - A 102): (in the robing room)

MR. SCHATTEN: I would merely like to offer the portion of the plea where Mr. Milch sets forth the statement of facts, and then simply to offer:

"Did you, in fact, give the police some \$200 in trying to work out a deal whereby they would drop the charges against Mr. Tarallo in this gambling operations?"

And Mr. Bugliarelli says yes.

And that the Court goes on to say: "You either did it or you didn't do it. If you didn't do it, I won't accept the plea. Did you do it?"

DEFENDANT BUGLIARELLI: "Yes."

I won't go into the rest. That is all I would offer.

MR. MUSOFF: I object, your Honor. Again, this is highly prejudicial. We are not trying a bribery case.

THE COURT: But why isn't this admissible to show, if the government contends, that he had an interest in a gambling operation?

MR. MUSOFF: But if he had the interest, the evidence shows he had it for --

THE COURT: Now you are arguing a different matter. You keep on going back to that.

I will allow it for that very limited purpose, as I did the original tape, particularly in the light of your contention by your questioning that the tape was tampered with, the suggestion that the tape should be rejected entirely.

After this discussion, the prosecutor, instead of confining himself to the Court's questioning of defendant, commenced to read into the record the entire statement of Milch's version of defendant's arrest and culpability to the Court. (A 106 - A 107)

Defendant objected which objection was sustained and the jury was told to disregard the statement. (A 107) Nevertheless, the prosecutor was permitted to read the following to the jury (A 108):

"Did you, in fact, give the police some \$200 in trying to work out a plea whereby they would drop the charges against Mr. Tarallo in this operation?"

And the defendant Bugliarelli says "Yes."

Despite the government's failure to prove that defendant had a source of income from gambling activities prior to 1972, the jury was permitted to conjecture that the defendant did, in fact, derive income from such activities in 1970 and 1971, a period going back over two years in time.

Additional facts relevant to the issues raised in this appeal are discussed under those individual points.

POINT I

The failure of the trial court to exclude the alleged admissions of defendant of no cash on hand when interviewed by Special Agents without procedural warnings is reversible error.

On October 3, 1967, more than five years prior to the first interview of the defendant by Special Agents of the Internal Revenue Service, the Internal Revenue Service issued instructions to all Special Agents. These instructions were disseminated in "IRS News Release No. 897, October 3, 1967" and provided as follows:

In response to a number of inquiries, the Internal Revenue Service today described its procedure for protecting the Constitutional rights of persons suspected of criminal tax fraud, during all phases of its investigations.

Investigation of suspected criminal tax fraud is conducted by Special Agents of the IRS Intelligence Division. This function differs from the work of Revenue Agents and Tax Technicians who examine returns to determine the correct tax liability.

Instructions issued to IRS Special Agents go beyond most legal requirements to assure that persons are advised of their Constitutional rights.

On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: 'As a special agent, I have the function of investigating the possibility of criminal tax fraud.'

If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel.

* * * * *

IRS said although many Special Agents had in their past advised persons, not in custody, of their privilege to remain silent and retain counsel, the recently adopted procedures insure uniformity in protecting the Constitutional rights of all persons." (emphasis supplied.) 7 CCH 1967 Stand. Fed. Tax Rep. Par. 6832.

On November 26, 1968, "IRS News Release No. 949" was published clarifying and augmenting the instructions of the prior news release. It provided:

Change in the procedure for advising taxpayers of their rights during an investigation conducted by a Special Agent of the IRS Intelligence Division were announced today by the Internal Revenue Service.

The new procedure goes beyond most legal requirements that are designed to advise persons of their rights.

One function of a Special Agent is to investigate possible criminal violations of Internal Revenue laws. At the initial meeting with a taxpayer, a Special Agent is now required to identify himself, describe his function, and advise the taxpayer that anything he says may be used against him. The Special Agent will also tell the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any documents, and that he has the right

to seek the assistance of an attorney before responding.

Previously, the Special Agent identified himself and described his function at the first meeting with the taxpayer but was not required to give further advice unless the taxpayer was in custody or the investigation proceeded beyond the preliminary stage.

IRS has made no change in its existing instructions that if it becomes necessary to interview a person who is in custody, an Agent must give a comprehensive statement of rights before any interrogation. This statement warns the person in custody that he may remain silent and that anything he says may be used against him.

A person in custody also must be told that he has the right to consult or have present his own counsel before making a statement or answering any questions, and that if he cannot afford counsel he can have one appointed by the U.S. Commissioner. 7 CCH 1968 Stand. Fed. Tax Rep. Par. 6946.

On December 6, 1972, the defendant was first interviewed by Special Agents of the Internal Revenue Service. In accordance with the announced procedural guidelines of the Internal Revenue Service, as set forth in "IRS News Release Nos. 897 and 949, supra, defendant was read his rights. (344)

During the course of this interview, the defendant responded to questions concerning bank accounts and the location of his safe deposit boxes. Significantly, the defendant refused to respond to two questions. First, he chose not to answer questions about inheritances and second, he refused to respond to inquiries concerning cash kept at home.¹⁶ (346)

16 The December 6, 1972 interview took place at Joe's Sweet Shop which is a luncheonette owned by the defendant.

From December 6, 1972 through June 18, 1973, a total of seven interviews were held between the defendant and Special Agents. Exclusive of the initial interview on December 6, 1972, the defendant was not apprised of his rights as dictated by the Internal Revenue Service and formally announced in the heretofore stated press releases. The failure to do so compels the suppression of all evidence elicited from the defendant, concluding any leads obtained therefrom, at the trial of this case. United States v. Leahey, 434 F.2d 7 (1st Cir. 1970).

Notwithstanding defendant's objections,¹⁷ Special Agent Mongelli's testimony that on June 18, 1973 defendant admitted that he kept no money at any location other than his bank account, was not stricken from the record. (232)

The significance of Mongelli's testimony of the alleged admissions of defendant of no cash on hand, is that such evidence is an essential cornerstone of the circumstantial methodology of proof - expenditures method of determining income - utilized by the prosecutor in this case. Unless the government can negate cash on hand, when all expenditures during the years in issue were made in cash, defendant would be entitled to a judgment of acquittal at the conclusion of the

17 Defendant's objections to such testimony came immediately after it was ascertained that Mongelli had not apprised the defendant of his rights before such interview. (236-245)

government's case.¹⁸ See Holland v. United States, 348 U.S. 121 (1954).

The very purpose of the safeguards that the Internal Revenue Service promulgated, the giving of a taxpayer his "rights" in a non-custodial situation, if followed by Special Agent Mongelli may not have led to the alleged admissions of the defendant at the June 18, 1973 interview. At the December 6, 1972 interview, the cash on hand question was not answered by the defendant after he received the promulgated warnings.

The admission of Mongelli's testimony regarding defendant's alleged admission of no cash on hand over defendant's objections constitutes reversible error.

A. The Procedural Guidelines of the Internal Revenue Service
The October 3, 1967 press release stated that a special agent was required to produce, at a preliminary interview, his credentials, and state that he was a special agent with "the function of investigating the possibility of criminal tax fraud." If preliminary inquiries necessitated further investigation, the special agent was thereafter required to give the taxpayer his rights.

The press release of November 26, 1968 required that the special agent at the first interview, i.e., the preliminary stage, to advise the taxpayer of his rights. No change was made in the October 3, 1967 requirement that if the investigation went

18 Defendant moved for a judgment of acquittal at the conclusion of the government's case (555 - 558) and in a motion under Rule 29(c) of the Federal Rules of Criminal Procedure. Both motions were denied.

beyond the preliminary stage, the taxpayer would be given his "rights" anew. In United States v. Bettenhausen, 499 F.2d 1223 (10th Cir 1974) the taxpayer was the subject of several interviews by the special agents. At each such interview some warnings were given. Although the Court chose not to suppress admissions of the defendant, it did so because there was no showing of a "substantial omission" of the requirements of the 1967 and 1968 press release. Supra at 1231. The significance of Bettenhausen lies in the fact that the special agents, in that case, did advise the defendant of his "rights" not only at the preliminary interview but at all subsequent interviews. Thereby, they substantially complied with the underlying philosophy of the Internal Revenue Service, in publishing News Release 897 and 949, to create and "insure uniformity in protecting the Constitutional rights of all persons." The defendant was not afforded the same treatment as Bettenhausen. He was not advised of any of his rights after December 6, 1972 even though the interviews thereafter spanned more than six months. It was not until the very last meeting with defendant that the purported admissions were made. Unlike Bettenhausen, there can be no question that the non-compliance of the special agents in advising defendant of his procedural safeguards prejudiced him.

B. Effect of the Special Agent's Failure to Comply with the Procedural Guidelines Established by the Internal Revenue Service.

The issue of suppression of statements made by a taxpayer where special agents have not complied with instructions issued

to them and published in "IRS News Release No. 897, October 3, 1967" was first decided in United States v. Heffner, 420 F.2d 809 (4th Cir 1969). In Heffner, the taxpayer was neither apprised that the special agent had the function of investigating criminal tax fraud, nor that the defendant had a right to retain counsel. The Court of Appeals, Fourth Circuit, in suppressing the statements stated:

An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.

Supra at 811. The foundation for this principle of law emanated from the Supreme Court's opinion in Accardi v. Shaughnessy, 347 U.S. 260 (1954). As the Fourth Circuit noted, it matters not that such instructions were not labeled as a regulation, citing Vitarelli v. Seaton, 359 U.S. 535 (1959) where the Supreme Court vacated discharges of government employees, which discharges were in contravention of a Department of Interior "Order." United States v. Heffner, supra at 812. Nor does it matter that the procedural safeguards directed by the Internal Revenue Service to be given taxpayers by special agents exceeded Constitutional guarantees as enunciated in Miranda v. Arizona, 384 U.S. 436 (1966). In Service v. Dulles, 354 U.S. 363, 388 (1957), the Supreme Court stated:

While it is of course true that * * * the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards * * * having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.

The sole issue, as Mr. Justice Douglas stated in American Farm Lines v. Black Ball, 397 U.S. 532, 538-39 (1970), is whether the rules were intended "to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion..." There can be no question that such is the case with the news releases in question, and where there has been a violation of such procedural rights, admissions of the defendant elicited have been suppressed. United States v. Heffner, supra; United States v. Leahey, supra; United States v. Sourapas,¹⁹ 515 F.2d 295 (9th Cir 1975); Contra, United States v. Fukushima, 373 F.Supp 212 (D. Hawaii 1974)²⁰

19 In Sourapas, the Court suppressed evidence relevant Supra at 299. Since no corporate records are in issue herein this portion of the Sourapas opinion is irrelevant.

20 The Fukushima case was decided prior to Sourapas. The judge in Fukushima, supra at 218 stated:

Therefore, inasmuch as the Ninth Circuit has held as it did in Robson, where the Fifth Amendment due process problem was in a narrow sense before them, this Court can only conclude that in the Ninth Circuit, absent deceit or over-reaching, where agents of the Intelligence Division of IRS have properly identified themselves and disclosed their purpose to investigate tax returns, they are under no constitutionally mandated duty to advise the taxpayer of his Fifth Amendment rights or of the criminal nature of the investigation. That they might properly be internally disciplined by the IRS for bypassing any of its own specific procedures gives no legal comfort or rights to the taxpayer.

In light of Sourapas, the Fukushima opinion appears to have no vitality.

C. The Second Circuit position on the failure to comply with procedural rights afforded an individual by a governmental agency.

Although the specific issue of whether a special agent of the Internal Revenue Service is required to comply with the procedural mandates of the two news releases has never been decided in the Circuit, this Court has in substance concurred with the Leahy and Heffner rationale.

In Smith v. Resor, 406 F.2d 141 (2d Cir 1969), this Court was confronted with the question of whether a United States Army Reserve officer had complied with procedural dictates as set forth in an Army Weekly Bulletin. Further, what effect, if any, would such failure to comply have?

The issue arose in the context of an Army reservist having received "unsatisfactory" ratings for attendance at reserve meetings because of long hair and being ordered to active duty. Army Bulletin 42 provided certain procedural guidelines which this Court found were not followed by the Army. This Court, in remanding the case to the District Court, stated:

Although the Courts have declined to review the merits of decisions made within the area of discretion delegated to administrative agencies they have insisted that where the agencies have laid down their own procedures and regulations, those procedures and regulations cannot be ignored by the agencies themselves even where discretionary decisions are involved.

Supra at 145. This Court employed the same rationale that was ultimately utilized by the Fourth Circuit in Heffner²¹ and the First Circuit in Leahay. Defendants see no distinction between Smith v. Resor, supra, and the instant case. Procedural rights were denied to both defendants to their prejudice. In each instance, the denial of such procedural rights resulted in a substantial prejudice to the defendant.

The relief sought herein, the suppression of the alleged statements of the defendant on June 18, 1973 to Special Agent Mongelli, should have been granted by the Trial Court. The failure to do so, in light of the fact that only with such statements of the defendant could an opening cash on hand be established, was reversible error.

21 The Heffner case cites Smith v. Resor, supra for support
United States v. Heffner, supra at 813.

POINT II

The introduction of the wire-recording of February 11, 1972, and testimony relevant thereto, to purportedly establish a likely source of income for the years 1970 and 1971, so prejudiced the defendant's case that a mistrial should have been granted.

An essential element of proof in a tax invasion case using the cash expenditures method of proof is the establishment of a likely source of taxable income. Holland v. United States, 348 U.S. 121 (1954). To establish such a likely source, the prosecutor resorted, over strenuous objections of the defendant, to a wire-recording made on February 11, 1972 during the raid of a gambling establishment operated by Vincent Tarallo. The prosecutor, however, did not rest with the introduction of this highly inflammatory and prejudicial evidence. He buttressed it with the cumulative testimony of the police officer who wore the recording device; reinforced it with the testimony of another police officer, William John, present during the raid; and, finally, utilized the Assistant District Attorney who prosecuted the defendant in connection with the bribe offer made on the premises that was raided to introduce the statements surrounding the acceptance of the plea by the defendant to giving an unlawful gratuity.

The evidence introduced in connection with the events of February 11, 1972, including the plea of the defendant, had no relevancy to his prosecution for income tax evasion for the years 1970 and 1971. Even if a scintilla of relevancy can be ascribed to those events, the prejudice attendant to the introduction of such testimony was so egregious that any probative value was bottled up in this morass of prejudicial "evidence." Consequently, the failure to suppress the introduction of the recording as well as the failure of the Court to preclude testimony on such events was error of the greatest magnitude and necessitates a reversal of the conviction. United States v. Tomaiolo, 249 F.2d 683, 695 (2d Cir. 1957).

A. The wire-recording of February 11, 1972.

Although the defendant was on trial for income tax evasion for the years 1970 and 1971, a wire-recording, dealing with events twenty-five and one-half months after the start of the first year in issue and almost one and a half months after the close of the last year in issue was offered, and, over strenuous objections, placed into evidence.

The wire-recording as played to the jury commenced when police officers of the Public Morals Division of the New York City Police Department raided the gambling establishment of Vincent Tarallo on February 11, 1972. (A 175, A 176) The

22 Patrolman William John testified that the premises had been under surveillance some two weeks prior to February 11, 1972 (A 79). John further testified that it was Tarallo's gambling operation. (A 79 - A 80)

The recording indicates that upon entering the premises, the policemen found Tarallo with gambling records, including tally sheets and money.²³ Tarallo was thereupon arrested. According to Blatus' testimony he was arrested for "illegal gambling, mutual horse race policy." (A 12) Unless it was the avowed purpose of the prosecution to instill in the minds of the jury that the defendant was an associate of an individual of bad character like Tarallo, and therefore defendant by implication was also a man of bad character, what conceivable purpose could such evidence serve, other than to prejudice the jury against the defendant? See United States v. Tomaiolo, supra at 690, where this Court stated:

In summary, by receiving the mass of inadmissible, irrelevant and highly prejudiced testimony, the District Court permitted the prosecution to paint the defendant...as a bad man, associating with criminal companions, who would do most anything. The accumulation of these errors made it impossible for the jury to limit its consideration to the charges... and, in sum, they constitute reversible error.

The above quoted language is obviously applicable to the prosecutor in introducing the bribe money into evidence.²⁴ (A 17 - A 19)

23 Sergeant Blatus was permitted to testify in depth as to what had transpired prior to the defendant entering the premises (A 5 - A 12), notwithstanding that his entire testimony was cumulative of what was said on the recording.

24 The Court indicated that "it is being received for the very limited purposes indicated and no other purpose." (A 19) Purportedly, the purpose was to establish that gambling activities in 1972 were a source of income for the expenditures in 1970 and 1971. At the time of the defendant's plea in connection with the bribery case the Court asked of the defendant:

Did you, in fact, give the police some \$200 in trying to work out a plea whereby they would drop the charges against Mr. Tarallo in this operation?

Defendant's response was "Yes." (A 108) Accordingly, the admission of the bribery money could serve no purpose.

Nor was the admission of the bribery money the sole reference to it during the trial. Over defendant's objections Patrolman William John testified to it. (A 75, A 76) Further violation of defendant's rights was the reading by the prosecutor into the record the statement that Assistant District Attorney Milch made to the Court at the time the defendant entered his plea, which contained a rehashing of the events of February 11, 1972.²⁵

(A 105 - A 107)

The introduction of the actual bribe money clearly does not fit within the ambit of the rule in this Circuit that:

....evidence of another crime may be introduced if, though only if, it 'is substantially relevant for some other purpose than to show a probability' that the defendant 'committed the crime on trial because he is a man of criminal character.'

United States v. Bozza, 365 F.2d 206, 213 (2d Cir 1966);

United States v. Papadakis, 510 F.2d 287, 294 (2d Cir 1975).

The bribe money was introduced for one reason - to establish that the defendant corrupted policemen. The prosecutor so stated in his summation, as follows:

25 It was the understanding of both the defendant and the Court, notwithstanding defendant's objections, the prosecution would be permitted to read to the jury the Court's remarks to the defendant at the time his plea was taken (A 107) in connection with the events of February 11, 1972. After the prosecutor read the entire Assistant District Attorney's remarks to the judge, setting forth the State's version of the events of February 11, 1972, the Court ordered the same stricken from the record.
(A 108)

Now they tell you, well, Sergeant Blatus is a dirty,
corrupt cop, a dirty rotten man.²⁶

Well, ladies and gentlemen, unfortunately, in our system, police system, there are policemen who are not perfect. However, Sergeant Blatus is not on trial here, and I must say that while they call him a dirty, rotten cop, Mr. Bugliarelli, a small luncheonette owner, wasn't above offering a bribe to him, a \$200 bribe that you heard about and is in evidence; and they aren't above offering a bribe to a lot of other policemen either, and maybe this all accounts for some of the corruption in the city, and that's what this gambling operation is all about, and then he has the nerve to claim that Sergeant Blatus is a man of corruption. (A 16)

The prejudicial error in admitting the bribe money lies not solely in the exhibiting of the money, but why it was offered. Nor could the trial judge's repetitive instructions to the jury, that it was evidence relevant to a likely source of income, erase the prejudicial impact of seeing the money used to corrupt a police officer. See United States v. DeDominicis, 332 F.2d 207, 210 (2d Cir 1964); United States v. Brettholz, 485 F.2d 483, 487 (2d Cir 1973), cert. denied 415 U.S. 976 (1974).

B. The Defendant's arrest record.

It is the rule of law in this Circuit that a defendant who does not testify neither places his character in issue, nor subjects his credibility to attack. United States v. Tomaiolo, supra at 695-96. Notwithstanding, evidence that the defendant had an arrest record was brought before the jury, not once,

26 Blatus refused to answer questions concerning whether he ever accepted an illegal gratuity until he had advice of counsel. (A 52) Blatus also refused to answer whether he was a member of "Sergeant's Club" for illegal activities. (A 53)

but three times. The prosecutor elicited from Sergeant Blatus the following testimony concerning the events following the defendant's arrest on February 11, 1972.

MR. SCHATTEN: He didn't want to tell you the name of the people he knew.

BLATUS: He just wanted me to inquire. When I kept asking "Inquire where? I wouldn't know where to start," he just said, you know, "That's it." He told me "Just ask anybody," he says. I'm Joe Bugliarelli, I've got a record. Just check my sheet."

SCHATTEN: What did that mean to you?

BLATUS: That meant the he had a record, he was arrested by the police, he had a record and to check his sheet and I could see whatever arrests were on the sheet.

MR. MUSOFF: I object and move that those statements be stricken from the record.

THE COURT: They are stricken, the jury is instructed to disregard them.

MR. SCHATTEN: What happened thereafter?

THE COURT: Draw no inference of any kind from the testimony. (A 23)

The second and third time the jury was apprised of the defendant's "record" was during the listening to the wire-recording and reading of it in the transcript of the recording. (A 175, A 188).²⁷

27 During the cross-examination of Ann Bugliarelli, the prosecutor also attempted to elicit her knowledge of whether the defendant had been arrested. Defendant objected before a response could be given and the objection was sustained. (654) Given the clearly prejudiced character of the question, the asking of it was prejudicial error even if the prosecutor had a basis in fact for doing so. See United States v. Tomaiolo, supra.

Immediately after the playing of the wire-recording defendant requested at the bar a cautionary instruction concerning the portion of the wire-recording where defendant states that he has a "record" (A 36). The Court stated:

I will issue a cautionary instruction with respect to that and I will go beyond that. I think it ought to be deleted entirely. (A 36)

The instruction was not issued and the jury adjourned for the night with the knowledge that the defendant had an arrest record firmly implanted in their mind. Again, the next day, the defendant requested the instruction regarding the arrest record (A 42 - A 43). The Court then ordered it excised, but never advised the jury of the same (A 44).

The jury's hearing that the defendant had an arrest record via Sergeant Blatus' testimony and the wire-recording and reading it in the aid memoire (A 175, A 188) while listening to the wire-recording, although the defendant never testified, with but one admonition by the Court, requires a reversal of the instant conviction. As the Court stated in United States v. Tomaiolo, supra at 695:

...This testimony indicating a criminal record could only serve to prejudice the jury. It made a fair and impartial trial impossible. Although the jury was advised to disregard the statement, that could not have erased from their minds its prejudicial effect.

Nor can it be said the prosecutor was surprised by the fact that the criminal past of the defendant would be laid before the jury. The prosecutor had the tape and the aid memoire; it was his evidence and Blatus was his witness. Indeed, the prosecutor's questions were explicitly designed to elicit the defendant's arrest record. Lest there be any doubt as to the prosecutor's intentions, it should also be noted that he attempted to elicit defendant's arrest record from another witness, Ann Bugliarelli (654).

Viewed in the context of the testimony regarding Tarallo and the introduction of the bribe money, the testimony pertaining to the defendant's arrest record was part of a concerted effort to prejudice the jury against the defendant. In United States v. DeDominicis, supra at 210, this Court stated:

...Error in admitting evidence may be cured by instructing the jury to disregard it unless it is so prejudiced that the jury will unlikely be able to erase it from their minds. United States v. Simone, 205 F.2d 480, 483 (2d Cir. 1953). If it is so prejudicial a mistrial should be ordered. Throckmorton v. Holt, 180 U.S. 552, 21, S.Ct. 474, 45 L.Ed. 663 (1901).²⁸

28 Using the same principles of law, the defendant moved for a mistrial. (700-702) A further motion for mistrial was made pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The latter motion was incorporated in an Omnibus Motion filed after conviction. Both motions were denied.

As this Court stated in United States v. Beno, 324 F.2d 582, 587 (2d Cir 1963), cert. denied 379 U.S. 880 (1964):

By attempting to show that Beno [the defendant] was the sort of man likely to be the perpetrator of crime, the prosecution denied him a fair opportunity to defend against the particular crime charged, for this sort of evidence weighs too heavily with the jury and makes impossible the dispassionate approach necessary if justice is to be achieved.

C. The likely source of income theory.

The introduction of the wire-recording made on February 11, 1972 was purportedly for the purpose of establishing that the defendant had, for the years 1970 and 1971 a likely source of taxable income - gambling. The sole reference in the recording that the defendant was engaged in gambling activities was when he responded to Sergeant Blatus' question of "What did it cost you before?" The defendant stated "a hundred and a quarter a month." No time framework was given, as to when the defendant allegedly had started such payments, but it is obvious that the prosecutor wished the jury to infer, and, by conviction of the defendant it must have done so, that the defendant was engaged in gambling in 1970 and 1971. If defendant's

argument is without merit, then how, as a matter of law, did the prosecutor establish a "likely source" of taxable income for 1970 and 1971?

It is a general principle of law that inferences and presumptions do not come within the relation back doctrine. Russell, Poling & Co. v. Conners, 252 F.2d 167, 170 (2d Cir 1958). The exception to the above principle is that such doctrine will apply to inferences if independent "convincing proof that acts performed at a later date could be performed at an earlier date." McFarland v. Gregory, 425 F.2d 443, 447 (2d Cir 1970); Berwind White Coal Mining Co. v. City of New York, 48 F.2d 105 (2d Cir 1931).

Assuming that the inference can be drawn that the defendant was engaged in gambling in 1972 by maintaining a "pad", it does not follow that such activity occurred during the two previous years. Nor was there the requisite independent convincing proof of such fact required to be presented by the prosecutor. McFarland v. Gregory, supra. See also 6 Wigmore on Evidence Par. 1904 at 574 (3 Ed 1940) where it was stated:

"Circumstantial evidence, concededly relevant, may nevertheless be excluded by reason of the general principle...that the probative usefulness of the evidence is more than counterbalanced by its

disadvantageous effects in confusing the issues before the jury, or in creating an undue prejudice in excess of its legitimate probative weight. In either case, its net effect is to divert the jury from a clear study of the exact purport and effect of the evidence, and thus obscure and suppress the truth rather than reveal it."

The admission of the wire-recording is further complicated by the fact that the defendant's statements, made on February 11, 1972 and used to establish a "likely source" of income for 1970 and 1971, were uncorroborated, and should have been stricken. Smith v. United States, 348 U.S. 147 (1954)²⁹

29 This is equally true of the defendant's alleged admission to the Special Agents on June 18, 1973 that "...he has never kept sums of money at his home or any other location other than in his bank accounts" (287) after he refused to answer such question during the December 6, 1972 interview (346). As the Supreme Court stated in Smith v. United States, supra at 155:

The negative implications of petitioner's opening net worth admission formed the cornerstone of the Government's theory of guilt. Without proof that assets on hand at the beginning of the prosecution period did not account for the alleged net worth increases, the Government could not succeed. Holland v. United States, ante, p. 121. An admission which assumes this importance in the presentation of the prosecution's case should not go uncorroborated, and this is true whether we consider the statement an admission of one of the formal 'elements' of the crime or a fact subsidiary to the proof of these 'elements.' It is the practical relation of the statement to the Government's case which is crucial, not its theoretical relation to the definition of the offense.

Specifically, there was no confirmation of the statement that the defendant maintained a "pad" or that he conducted illegal gambling activities in 1972, let alone 1970 and 1971. As a matter of fact, both Blatus and John conceded that they did not know of the defendant prior to February 11, 1972. (A 47 - A 48, A 78 - A 79). Blatus also testified that he discovered no police officer who was on the alleged "pad" (A 65 - A 66), and John testified that it was Tarallo's place of gambling activity, not that of the defendant. (A 80). There simply is no "substantial independent evidence" that defendant had a source of income as required by the Smith case. The entire evidence relevant to the wire-recording should have been stricken from the record, and failure to do so is reversible error. Smith v. United States, supra; United States v. Marcus, 401 F.2d 563 (2d Cir 1968), cert. denied 393 U.S. 1040 (1969).

In United States v. Terrell, 390 F.Supp 371 (S.D.N.Y. 1975), the admissions of the defendant were corroborated by a prosecution witness, under grant of immunity, that he had narcotics dealings with the defendant from 1967 through 1969, the indictment years being 1968, 1969 and 1970. Further, the defendant admitted that his largest income from narcotics activities was 1969, one of the indictment years. There is no admission of gambling activity by the appellant in the years in issue, or prior thereto.

In United States v. Eliano, ___ F.2d ___ (2d Cir 1975), 75-2 USTC 88,103, this Court in a per curiam opinion affirmed the conviction

of the defendant on three counts of income tax evasion. The prosecution had introduced into evidence the defendant's prior conviction of promotion of prostitution as to a likely source of income. This Court stated that the conviction "tended to prove that Eliano had caused one woman to engage in prostitution" which was the source of unreported income. Further, the fact that the defendant was engaged in prostitution was corroborated by one of the prostitutes.

In the instant case, there is no evidence of gambling activities in the years in issue and clearly no corroboration of any such activity in any year.

In United States v. Vario, 484 F.2d 1052 (2d Cir 1973), cert. denied 414 U.S. 1129 (1973) this Court affirmed the conviction of the defendant for willful submission of false income tax returns for 1965 and 1966 and one count of conspiracy to obstruct collection of income taxes. The prosecutor established that false returns were filed by showing that during the years in issue the defendant operated a policy business. He did so through the testimony of undercover agents and other witnesses who testified as to dealings with defendant. Such evidence is totally absent in the instant case.

Further, evidence was introduced pertaining to Vario pleading guilty "to a gambling charge for activities which occurred during 1965 and 1966," the years in issue. In this regard, Vario, unlike defendant, testified on his own behalf, thereby placing his credibility and character in issue.

In Johnson v. United States, 318 U.S. 189, 195 (1943)

the Supreme Court stated:

The case of an accused who voluntarily takes the stand and the case of an accused who refrains from testifying (Bruno v. United States, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed 257) are, of course, vastly different. Raffel v. United States, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed 1054. His voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all...

In the instant case, the defendant did not testify in his own behalf. Nor did the crime for which he pleaded guilty, giving an unlawful gratuity, take place in one of the indictment years. Nor did such crime have the relationship to the generation of a likely source of income as did the crime in Vario (bookmaking) or Eliano (prostitution). In United States v. Beno, supra at 587, this Court stated:

This requirement that past crime be of a similar nature before they are admissible on the issue of intent gives effect to one of the most fundamental notions known to our law -- that a man is entitled to be tried only for specific charges explicitly stated, and should not be compelled to defend a lifetime of conduct.

Additional evidence that Vario was engaged in gambling activities was adduced through the testimony of two policemen that Vario had showed them a strongbox with \$15,000 in currency.

Finally, there was testimony from a special agent of the Internal Revenue Service, who was engaged in surveillance of Vario in 1965, one of the indictment years, tending to show that Vario was paying police protection. This independent evidence, inferentially showing Vario paid police protection in 1965, was deemed properly admissible to show (1) that the defendant had income to pay protection; and (2) that he had a source of income that he was concealing.

Supra at 1056.

The distinctions between the Vario case and the instant one are manifest in three areas: First, in the Vario case the evidence of police protection came from an independent source and such evidence established that the activity occurred during the years for which the defendant was indicted. There was no corroboration that the defendant herein was paying police protection, or, for that matter, that police protection was ever paid during 1970 or 1971. Second, there was direct evidence of gambling activity in the Vario case, during the years in issue, while no evidence of gambling activity on the part of the defendant was adduced for the years 1970 and 1971, and mere conjecture was used to establish such activity as a likely source of income for 1970 and 1971. Third, in Vario, substantial independent evidence of gambling activity involving the defendant during the years 1965 and 1966 was presented. No evidence of independent evidence of a likely source of income for 1970 and 1971 was presented in this case.

It is submitted that such distinctions set apart the instant appeal from that of Vario.

Accordingly, the probative value of the wire-recording of February 11, 1972 and attendant testimony were substantially outweighed by the prejudice of such facts and it is clear that their admission made it impossible for the jury to limit its consideration only to the charges of income tax invasion, thereby mandating a reversal of conviction.

CONCLUSION

For all these reasons, the defendant's judgment of conviction should be reversed and the indictment should be dismissed or, in the alternative, a new trial should be granted.

Respectfully submitted,

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Attorneys for Defendant-Appellant

December 8, 1975

Wallace Musoff,
Barry D. Gordon

Of Counsel

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----- x
UNITED STATES OF AMERICA, : Docket No. 75-1348
Appellee, :
v. : AFFIDAVIT OF
: PERSONAL SERVICE
JOSEPH BUGLIARELLI, :
Defendant-Appellant. :
----- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WALLACE MUSOFF, ESQ., being duly sworn, deposes and
says:

1. Deponent is attorney for appellant in the captioned
case.

2. On December 8, 1975, deponent served upon the
office of the United States Attorney for the Southern District
of New York two copies of the appellant's brief, pursuant to
Rule 31(b) of the Rules of Appellate Procedure, and one copy of
the Appendix to be filed in the captioned case.

Sworn to before me, this
8th day of December, 1975.

David Kipper

Wallace Musoff
WALLACE MUSOFF

DAVID L. KIPPER
Notary Public, State of New York
No. 31-4519810 New York County
Term Expires March 30, 1976

CERTIFICATION BY ATTORNEY

STATE OF NEW YORK
COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

VERIFICATION, CORPORATE OR INDIVIDUAL

STATE OF NEW YORK
COUNTY OF

ss.:

, being duly sworn, deposes:

Deponent is the of ,
a corporation, in the within action;

Deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein alleged upon information and belief, and those matters deponent believes to be true.

The grounds of deponent's belief as to all matters not stated upon deponent's own knowledge are as follows:

Sworn to before me,
this day of , 19

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF } ss.:

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at
That on the day of 19
at No.

deponent served the within
upon
the herein,
by delivering a true copy thereof to h personally.

Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me,

this day of 19

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF } ss.:

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at
That on the day of 19
deponent served the within

upon

attorney(s) for

in this action, at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in - a post office - official depository under the exclusive care and custody of the United States post office department within New York State.

Sworn to before me,

this day of 19

